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Supreme Court, U.S.
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No. 03-341

IN THE

Supreme Court of the United States

ALLSTATE INSURANCE COMPANY,

Petitioner,

v.

WILLIAM NOAH, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR HOMESTEAD INSURANCE COMPANY AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Ninth Circuit erred in concluding, in contravention of applicable decisions of this Court and other courts, that the Constitution does not prohibit a State from retroactively abrogating a limitations provision in a contract for insurance.

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iii
INTEREST OF AMICUS 1
ARGUMENT 2
CONCLUSION 6

TABLE OF AUTHORITIES

Cases

20th Century Insurance Co. v. Superior Court, 90 Cal. App. 4th 1247 (2001), *cert. denied*, 535 U.S. 1033 (2002) 5

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) 6

Campanelli v. Allstate Insurance Co., 322 F.3d 1086 (9th Cir. 2003) 6

Campbell v. Holt, 115 U.S. 620 (1885) 2

Energy Reserves Corp. v. Kansas Power & Light Co., 459 U.S. 400 (1983) 5

Fageol Truck & Coach Co. v. Pacific Indemnity Co., 18 Cal. 2d 748 (1941) 2

Farmers' Co-operative Creamery Co. v. Iowa State Insurance Co., 84 N.W. 904 (Iowa 1900) 4

Hellinger v. Farmers Group, Inc., 91 Cal. App. 4th 1049 (2001) 1, 5

Home Insurance Co. v. Dick, 281 U.S. 397 (1930) 2, 3, 4, 5

Kee v. Shelter Insurance, 852 S.W.2d 226 (Tenn. 1993) 4

National Surety Co. v. Architectural Decorating Co., 226 U.S. 276 (1912) 3

Riddlesbarger v. Hartford Insurance Co., 74 U.S. (7 Wall.) 386 (1868) 2

Smith & Marsh v. Northern Neck Mutual Fire Ass'n, 70 S.E. 482 (Va. 1911) 5

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 6

Vu v. Prudential Property & Casualty Insurance Co., 26 Cal. 4th 1142 (2001) 5

Weisberg v. Royal Insurance Co., 464 N.E.2d 1170 (Ill. App. Ct. 1984) 3

Wells v. Union Central Life Insurance Co., 98 S.W. 697 (Ark. 1906) 5

Statutes

Cal. Code Civ. Proc. § 340.9 ..... 1, 2, 3, 4

Other Authorities

Annot., 112 A.L.R. 1288 (1938) 5

Annot., 16 A.L.R. 3d 452 (1967) 5

BRIEF FOR HOMESTEAD INSURANCE COMPANY AS AMICUS CURIAE SUPPORTING PETITIONER

Amicus Curiae Homestead Insurance Company respectfully submits that the petition for a writ of certiorari should be granted.[1]

INTEREST OF AMICUS

Homestead wrote insurance policies on commercial property in California that required all actions to be commenced within twelve months of the loss. In light of this contractual limitation, Homestead has long since resolved all claims arising out of the 1994 Northridge earthquake.

In 2000, the California Legislature purported to "revive" Northridge claims notwithstanding the expiration of any applicable *statute* of limitations. Cal. Code Civ. Proc. § 340.9. The state courts subsequently extended this "revival" feature to actions barred by *contractual* limitations periods. *Hellinger v. Farmers Group, Inc.*, 91 Cal. App. 4th 1049, 1056-59 (2001). Under this new statute, several of Homestead's insureds have initiated actions seeking additional Northridge-related damages.

Homestead agrees with petitioner Allstate Insurance Company that Section 340.9 violates the Contracts Clause of the United States Constitution. *See infra* at 5-6 & n.2. Homestead respectfully submits this brief to further demonstrate that the issue warrants this Court's review.

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief have been submitted to the Clerk.

ARGUMENT

This Court has long recognized that "insurers have a right to designate the terms upon which they will be responsible for losses," including setting a reasonable time within which the insured must initiate suit under the policy. *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. (7 Wall.) 386, 390 (1868). And California (like other American jurisdictions) has concluded that requiring the insured to sue within one year is a valid, reasonable, and enforceable contractual limitation. *Fageol Truck & Coach Co. v. Pacific Indem. Co.*, 18 Cal. 2d 748, 753 (1941). But California Code of Civil Procedure § 340.9 abrogates the one-year limitation included as a material term of the contracts of insurance issued by Homestead and other insurers.

The decision below, in which the Ninth Circuit concluded that Section 340.9's wholesale abrogation of a contractual obligation does not violate the Contracts Clause, cannot be reconciled with this Court's decision in *Home Insurance Co. v. Dick*, 281 U.S. 397, 410 (1930). In *Dick*, the Court held that a State could not constitutionally extend liability under an insurance contract "beyond the limit expressly agreed upon by the parties." *Id.* at 409 n.6.

The *Dick* Court drew a sharp distinction between statutes of limitation and contractual limitation periods, explaining that a contractual provision "differ[s] from the statutory limitation in . . . that it does not merely deny the remedy, but forfeits the liability, when the suit is not brought within the stipulated time." 281 U.S. at 406 n.4 (quotation omitted). As a result, a contractual limitation "deals neither with the kind of remedy available nor with the mode in which it has to be pursued"; rather, "[i]t purports to create rights and obligations." *Id.* at 410.

The distinction between statutory and contractual limitations periods is critical. In cases such as *Campbell v. Holt*, 115 U.S. 620 (1885), this Court has sustained against consti-

tutional challenge changes to *statutes* of limitations. But the *Dick* Court made clear that *contractual* limitations periods are entitled to considerably more constitutional protection:

> It is true that a state may extend the time within which suit may be brought in its own courts, *if, in doing so, it violates no agreement of the parties*. . . . [But when] the parties have expressly agreed upon a time limit on their obligation, a statute which invalidates the agreement and directs enforcement after the time has expired increases their obligation and imposes a burden not contracted for.

281 U.S. at 408-09 & n.6 (emphasis added).

This Court, in *Dick*, held that a state law that attempted to do precisely what Section 340.9 purports to do—*i.e.*, impose insurance liability after the contractual expiration period has run—was unconstitutional. Although the Court's decision ultimately rested on the Due Process Clause, the Court left no doubt that the same result would obtain under the Contracts Clause. Indeed, the Court cited a Contracts Clause precedent for the principle that "[t]here is a clear difference between the revival of a liability which is unenforceable only because a statute has barred the remedy regardless of the will of the parties, and the extension of a liability beyond the limit expressly agreed by the parties." 281 U.S. at 409 n.6 (citing *National Sur. Co. v. Architectural Decorating Co.*, 226 U.S. 276 (1912)).

Subsequent courts have relied on *Dick* to conclude that a State may not constitutionally abrogate a contractual limitations period. *See Weisberg v. Royal Ins. Co.*, 464 N.E.2d 1170, 1174-75 (Ill. App. Ct. 1984). As the Tennessee Supreme Court has explained in refusing to enforce a statute similar to Section 340.9:

> At the time the insurance contract was executed and at the time of loss, the law of this state, as incorpo-

> rated into the contract, required that the suit [be] commenced within the contractually limited time .... The amendment, if applied retrospectively, negates that requirement and allows the policyholder to extend his cause of action, despite the fact that he failed to comply with the contractual obligation. Clearly, retrospective application of the amendment would impair the accrued contractual rights of the insuror.

Kee v. Shelter Ins., 852 S.W.2d 226, 229 (Tenn. 1993). The decision below is irreconcilable with these authorities.

The decision below also conflicts dramatically with the Supreme Court of Iowa's decision in *Farmers' Co-operative Creamery Co. v. Iowa State Insurance Co.*, 84 N.W. 904 (Iowa 1900). The court there explained that a contractual limitation "is plainly distinguishable from one created by statute, and courts with great unanimity have so held." *Id.* at 904. In terms that this Court would echo in *Dick*, the court elaborated:

> Statutes of limitations are, of course, enacted by the legislature, and pertain exclusively to the remedy, and, with some exceptions not necessary to be stated, may be changed by the legislature so as to affect existing contracts. Contract rights and obligations cannot, as a general rule, be changed by subsequent legislation.... [B]y the uniform holding of the courts the contract relates, not simply to the remedy, but that it extinguishes rights. The statute ... undertakes to limit contract rights, and nothing more.

Ibid. The court noted that "[t]hese views ... have never been questioned, so far as we have been able to discover." *Ibid.* And so the law remained for more than a century, until the Ninth Circuit endorsed a contrary rule.

The decision below, and the state cases construing Section 340.9 (*Hellinger* and *20th Century Ins. Co. v. Superior Court*, 90 Cal. App. 4th 1247 (2001), *cert. denied*, 535 U.S. 1033 (2002)) that the Ninth Circuit ultimately endorsed, are the only decisions of which *amicus* is aware in which a statute, enacted after the issuance of a policy with a contractual limitations provision and after the occurrence of the loss that forms the basis of the claim, has been held to validly "revive" a contractually barred claim. *See Wells v. Union Cent. Life Ins. Co.*, 98 S.W. 697 (Ark. 1906); *cf. Smith & Marsh v. Northern Neck Mut. Fire Ass'n*, 70 S.E. 482 (Va. 1911). The invalidity of statutes like Section 340.9 has thus been settled law for over a hundred years. *See generally* Annot., 16 A.L.R. 3d 452 (1967); Annot., 112 A.L.R. 1288 (1938).

The decision below contravenes a century of precedent, including this Court's decision in *Dick*. Under existing law, a statute like Section 340.9 could not be applied in Arkansas, Iowa, Tennessee, Illinois, Virginia, or a number of other jurisdictions. Yet, in California, Homestead and other insurers are now subject to suit for claims that have long since been extinguished by contract. This differential treatment should not be allowed to stand unexamined.

Upon such examination, it is apparent that Section 340.9 fails each of the three Contracts Clause elements articulated by this Court in *Energy Reserves Corp. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983): The statute substantially impairs—indeed it completely abrogates—contractual obligations; it does not serve a legitimate public purpose; and it is not reasonably tailored to such a purpose. *Cf. Vu v. Prudential Prop. & Cas. Ins. Co.*, 26 Cal. 4th 1142, 1146 n.1 (2001) ("there is a substantial dispute . . . whether [Section 340.9] is constitutional"). The court of appeals correctly concluded that Section 340.9 effects a substantial impairment, but erred in holding that impairment justified by the circumstances surrounding the Northridge earthquake. Pet.

12-18; *see Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).[2]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[2] The court below relied exclusively on "the highly-regulated nature of the California insurance industry and the statutory underpinnings of the contractual limitations clause" in concluding that "§ 340.9's interference with contracts, while substantial, is not so severe as to render the statute unconstitutional." *Campanelli v. Allstate Life Ins. Co.*, 322 F.3d 1086, 1098-99 (9th Cir. 2003). But Homestead is *not* licensed in or regulated by the State of California, and its contractual limitations provision is *not* required by any California statute. Thus, even if the statute can constitutionally be applied to admitted insurers employing statutory forms, it violates the Contracts Clause as applied to unregulated insurers such as Homestead.